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Judicial Ethics Advisory Committees Should Render Opinions Which Adhere to Binding United States Constitutional Precedents

*Honorable Howland W. Abramson and Gary Lee**

I. INTRODUCTION

Judicial ethics advisory committees provide legal advice to judges who inquire whether their prospective conduct is prohibited or permitted by the judicial ethics code which applies in their jurisdiction.¹ In rendering their advice, judicial ethics advisory committees, at the very least, should adhere to binding precedents applying the United States Constitution to the judicial ethics code. When First Amendment rights are involved, judicial ethics advisory committees should apply traditional First Amendment doctrine, and only limit First Amendment rights when it is determined that there is a compelling state interest and that the rule, canon or regulation is narrowly tailored to serve that interest.²

Although it may seem elementary that judicial ethics advisory committees should consider applying binding constitutional prece-

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1. There are judicial ethics advisory bodies for the federal courts, 36 states, and the District of Columbia. American Judicature Society Model Procedural Rules for Judicial Ethics Advisory Committees (1996), app. A; D. SOLOMON, *THE DIGEST OF JUDICIAL ETHICS OPINIONS* vii (1991). In most jurisdictions, such judicial ethics advisory opinions are not binding, but may be considered as a defense or in mitigation of discipline. J. SHAMAN, ET. AL., *JUDICIAL CONDUCT AND ETHICS* 1.11 (3d ed. 2000). However, in some jurisdictions, judicial ethics advisory opinions although not binding are considered to have precedential weight or to be admissible in any disciplinary proceeding involving the inquiring judge. American Judicature Society Model Procedural Rules for Judicial Ethics Advisory Committees (1996), app. A, Minnesota, West Virginia.

2. This concept is known as strict scrutiny. For application of this doctrine, *see, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

dents to judicial ethics codes in rendering advice, historically, this has not always been the practice.³ For example, some judicial ethics advisory committees have declined to consider the application of constitutional law to judicial ethics questions on the ground that their responsibility does not extend to rendering legal advice or interpreting the United States Constitution.⁴

Moreover, some commentators consider that judges have no constitutional rights which they can raise to challenge judicial ethics provisions because they are deemed to have waived their rights when they assumed office.⁵ In contrast, in judicial ethics litigation, many courts, including the United States Supreme Court, have held that various provisions of judicial ethics codes violated the First Amendment or have revised judicial ethics codes to comply with the United States Constitution.⁶

If state courts would be bound by precedents applying the United States Constitution to the state judicial ethics codes, judicial ethics advisory committees likewise should not give advice inconsistent with those precedents. Whenever a judge seeks ethics advice from a judicial ethics advisory committee on a matter implicating constitutional rights, the committee should satisfy itself that there is a compelling state interest that overrides such rights before issuing an opinion prohibiting their exercise.⁷

For instance, in *Application of Gaulkin*, the Supreme Court of New Jersey reversed its previous policy and permitted the wife of a New Jersey judge to seek elective office, holding that the wife's First Amendment right should not be infringed.⁸ The court stated: "Where a court is dealing with a First Amendment right (here the political involvement of the non-judicial spouse), fears that its exercise will have undesirable consequences cannot inhibit judicial vindication thereof."⁹

3. See, e.g., Louisiana Committee on Judicial Ethics Opinion 61 (August 31, 1984); Maryland Judicial Ethics Committee Opinion 19 (April 10, 1974). The Preface to the ABA 1990 Model Code of Judicial Conduct provides that the Code "should be applied consistent with constitutional requirements..." This is discussed in more detail *infra* note 15 and accompanying text.

4. See, e.g., *supra* note 3.

5. One of the authors of this article, Judge Abramson, has encountered this view at judicial ethics education programs. Because this view is expressed orally, it is not subject to the scrutiny and debate that would occur if it were expressed in writing.

6. See, *infra* text at note 25 *et seq.*

7. See *supra* note 2.

8. *Application of Gaulkin*, 351 A.2d 740 (N.J. 1976).

9. *Id.* at 747.

To the extent judicial ethics advisory committees fail to consider binding constitutional precedents, they deviate from the custom and tradition of discussing all pertinent legal issues in legal opinions;¹⁰ they may fail to meet the expectations of the inquiring judge; they undermine respect for and compliance with their opinions;¹¹ and they foster a view that the committees' opinions are arbitrary or not well-grounded in law. When judicial ethics advisory committees render opinions interpreting judicial ethics code provisions in derogation of constitutional rights, a variety of hardships is created. In addition to chilling judges' exercise of constitutional rights, these actions may cause judges to needlessly spend time and money seeking declaratory relief to avoid the risk of discipline; may cause judges to risk a disciplinary prosecution in which judges' failure to comply with committees' constitutionally incorrect advice may be used against them;¹² may deprive judges of favorable advisory opinions which judges can use to defend against judicial ethics prosecutions; and may deter judges from seeking the committees' advice in the future.

This article will discuss the cases in which judicial ethics code provisions have been challenged on constitutional grounds.¹³ The

10. A legal opinion has been defined as:

[a] written document in which an attorney provides his or her understanding of the law as applied to assumed facts. The attorney may be a private attorney or attorney representing the state or other governmental entity. Private attorneys frequently render legal opinions on the ownership of real estate or minerals, insurance coverage, and corporate transactions. A party may be entitled to rely on a legal opinion, depending on factors such as the identity of the parties to whom the opinion was addressed and the law governing these opinions.

BLACK'S LAW DICTIONARY (7th Ed. 1999).

11. Canon 7B(1)(a) of the 1972 Code requires a judge who is a candidate for judicial elective office to "encourage members of his family to adhere to the same standards of political conduct that apply" to the judge. MODEL CODE OF JUDICIAL ETHICS Canon 7(B)(1)(a). Under Canon 7 of the 1972 Code, a judge cannot, among other things, hold office in a political organization and cannot speak in support of a candidate for nonjudicial office. If a judicial ethics advisory committee rendered an opinion that required the judge to discourage the judge's spouse from engaging in such activity, the committee's opinion would be viewed as obviously in derogation of the spouse's constitutional rights. See, e.g., *Gaulkin*, 351 A.2d 740.

12. Judges who may wish to seek administrative judicial positions or other judicial office, especially when such other judicial offices are filled by election, risk the use of a judicial disciplinary proceeding against their candidacy even if they ultimately prevail in the disciplinary proceeding. See *In re Voorhees*, 739 S.W. 2d 178, 186 (Mo. 1987) ("Even a successful defense does not completely erase the effect of widely published charges.").

13. Some of the articles which discuss judicial ethics and speech in certain contexts are: Richard A. Dove, *National Summit on Improving Judicial Selection: Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447 (2001); William G. Ross, *Extrajudicial Speech: Navigating Perils and Avoiding Pitfalls*, 38 COURT REVIEW 36 (2001); Stephen J. Fortunato, *On a Judge's Duty to Speak Extrajudicially: Rethinking the*

recent United States Supreme Court decision, *Republican Party of Minnesota v. White*, holding that a judicial ethics provision violated the First Amendment, illustrates the constitutional issues involved in the interpretation of judicial ethics provisions.¹⁴ Other federal and state court cases interpreting the First Amendment in accordance with judicial ethics codes will also be examined. On the basis of this review of applicable case law, we conclude that judicial ethics advisory committees should render advice consistent with the First Amendment.

II. CONSTITUTIONAL RIGHTS AND ETHICS CODES IN GENERAL

Judges and judicial candidates do not, by virtue of their status, give up their rights as citizens.¹⁵ Rather, judges and judicial can-

Strategy of Silence, 12 GEORGETOWN J. LEGAL ETHICS 679 (1999); Max Minzner, *Gagged but not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209 (1999); Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH L. REV. 811 (1998); Jason Miles Levien & Stacie L. Fatka, *Cleaning up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation*, 2 MICH. L. & POL'Y REV. 71 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U.L. REV. 760 (1995); Erwin Chemerinsky, *The Sound of the Gavel: Perspectives on Judicial Speech: Is it the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995); Abbie G. Baynes, *Judicial Speech: A First Amendment Analysis*, 6 GEORGETOWN J. LEGAL ETHICS 81 (1992); Martin J. McMahon, *First Amendment Protection for Judges or Government Attorneys Subjected to Discharge, Transfer, or Discipline Because of Speech*, 108 A.L.R. FED. 117 (1992); Gerald Uelman, *Disqualification of Judges for Campaign Support or Opposition*, 3 GEORGETOWN J. LEGAL ETHICS 419 (1990); James J. Alfini and Terrence J. Brooks, *Perspectives on the Selection of Federal Judges: Ethical Constraints on Judicial Election Campaigns: A Review and Critique of Canon 7*, 77 KY. L.J. 671 (1989); Erwin Chemerinsky, *Ideology, Judicial Selection and Judicial Ethics*, 2 GEORGETOWN J. LEGAL ETHICS 64 (1989); Steven Lubet, *Professor Polonius Advises Judge Laertes: Rules, Good Taste And the Scope of Public Comment*, 2 GEORGETOWN J. LEGAL ETHICS 665 (1989); William G. Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEORGETOWN J. LEGAL ETHICS 589 (1989); William G. Ross, *Rules for Extrajudicial Speech: Too Broad and Too Narrow*, 2 GEORGETOWN J. LEGAL ETHICS 691 (1989); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. REV. 207 (1987); Leonard E. Gross, *Judicial Speech: Discipline and the First Amendment*, 36 SYRACUSE L. REV. 1181 (1986).

14. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

15. E. W. Thode, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 95 (1973). The 1990 Code 4I Commentary provides: "[a] judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties." The 1972 Code 5C (6) Commentary is substantially the same. ABA CANONS OF JUDICIAL ETHICS (1924) Canon 28 provided:

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.

didates retain their constitutional rights. The Preamble to the ABA 1990 Model Code of Judicial Conduct provides, in part: "The Canons and Sections are rules of reason. They should be applied consistent with *constitutional requirements*, statutes, other court rules and decisional law and in the context of all relevant circumstances."¹⁶ Because of a concern with federal constitutional rights, the 1990 Code also revised the 1972 Code by broadening both the permissible speech of judicial candidates and the permissible speech of judges about pending or upcoming cases.¹⁷

Each state adopts its own version of the model code. Commentary to a provision of the Wisconsin Code of Judicial Conduct expressly states that "[r]estrictions on the personal conduct of judges cannot, however, be so onerous as to deprive them of fundamental freedoms enjoyed by other citizens."¹⁸ Similarly, the California Code of Judicial Conduct provides that "[j]udges are entitled to entertain their personal views on political questions. They are not required to surrender their rights or opinions as citizens."¹⁹ One legal commentator has likewise observed that "[b]y becoming a

The 1990 Code 2A Commentary provides:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

ABA COMPENDIUM OF PROF. RESP. RULES AND STANDARDS 275.

The 1972 Code 2A Commentary is substantially the same.

16. ABA COMPENDIUM OF PROF. RESP. RULES AND STANDARDS 271 (emphasis added).

17. The 1990 Code 5A(3)(d)(ii) replaced the 1972 Code 7B(1)(c)'s broad prohibition against a candidate's announcing the candidate's views on disputed legal or political issues with the narrower one against making statements that appear improperly to commit the candidate with respect to matters likely to come before the candidate's court... The [1990 Code] Committee believed its revised rule to be more in line with constitutional guarantees of free speech, while preventing the harm that can come from statements damaging the appearance of judicial integrity and impartiality. MILORD, DEVELOPMENT OF THE ABA JUDICIAL CODE 50 (1992).

The 1990 Code 3A(9) prohibits, while a case is pending or upcoming, a judge from making any public comment that might reasonably be expected to affect its outcome or impair its fairness. The 1990 Code Committee believed that the 1972 Code 3A (6) provisions prohibiting a judge from making any public comment about a pending or upcoming case were overbroad and unenforceable. MILORD, *supra* at 21.

The Federal Judicial Conference, the District of Columbia, and all of the states except Montana have judicial ethics codes which are based upon the ABA Model Code of Judicial Conduct (1990), the ABA Model Code of Judicial Conduct (1972), or a combination of the two. J. SHAMAN, *supra* note 1, at 1.02.

18. Wisconsin SCR Ann. 60.03 (1).

19. CALIFORNIA CODE OF JUDICIAL ETHICS, Canon 5.

judge, a citizen does not surrender his First Amendment right to free speech."²⁰

III. ROLE OF A JUDICIAL ETHICS ADVISORY COMMITTEE

The American Judicature Society has suggested model rules and a guide for judicial ethics advisory committees.²¹ One of its model rules prohibits the committee from issuing "an advisory opinion that interprets any constitutional provision, statute, rule or regulation that does not relate to judicial ethics."²² This suggested model rule would forbid a committee from expressing an opinion that a provision of the code of judicial conduct violates the federal constitution.²³

The idea that a judicial ethics advisory committee should refrain from adhering to binding constitutional precedents in rendering opinions to judges ignores the growing body of judicial precedent limiting or abolishing judicial ethics provisions on the basis of the United States Constitution and, as has been previously discussed, imposes on judges seeking opinions the cost and expense of instituting suit, defending suit, or foregoing the exercise of constitutional rights. The matter is worse if a jurisdiction permits the judicial ethics advisory committee's opinion to be used against the inquiring judge if the judge does not follow the committee's advice.²⁴

20. William Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEORGETOWN J. LEGAL ETHICS 589, 594 text at n.19 (1989); discussing *In re Sanders*, 955 P.2d 369, 375 (1993), discussed *infra* note 135 and accompanying text..

21. AMERICAN JUDICATURE SOCIETY MODEL PROCEDURAL RULES FOR JUDICIAL ETHICS ADVISORY COMMITTEES (1996).

22. *Id.* at Rule 22.

23. Note to AMERICAN JUDICATURE SOCIETY MODEL PROCEDURAL RULES FOR JUDICIAL ETHICS ADVISORY COMMITTEES (1996) Rule 22.

24. However, if a judicial ethics advisory committee is expressly constrained by the law or rule which creates the committee from considering the application of the United States Constitution to an ethics inquiry, the committee may have no choice.

IV. JUDICIAL ETHICS CASES INVOLVING THE UNITED STATES
CONSTITUTIONA. *Campaign Speech*1. *Republican Party of Minnesota v. White*

In *Republican Party of Minnesota v. White*, a 5 to 4 decision, the United States Supreme Court held that the Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(I) (the “announce clause”), which prohibited candidates for judicial office from announcing their views on disputed legal or political issues, violated the First Amendment.²⁵ The Minnesota Canon at issue was “based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct.”²⁶

In upholding the announce clause, the Eighth Circuit had relied on the widespread practice arising over the past half-century forbidding judicial candidates from discussing disputed legal and political issues.²⁷ In reversing the court of appeals, the Supreme Court noted that there was no historical basis for the prohibition and that, in the modern era, many jurisdictions permitted such speech.²⁸

Justice Scalia, writing for the majority, observed that the prohibition banned a candidate’s statement of his current position, even if the candidate did not promise to maintain that position after the election.²⁹ The Court reached that conclusion because another provision of the Minnesota Code prohibited “judicial candidates from making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.”³⁰ The district court had construed the announce clause to include only disputed issues that were likely to come before the court on

25. *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528 (2002). Justice Scalia delivered the opinion of the court in which Chief Justice Rehnquist and Justices O’Connor, Kennedy and Thomas joined. Justices O’Connor and Kennedy filed concurring opinions. Justice Stevens filed a dissenting opinion in which Justices Souter, Ginsburg, and Breyer joined. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, Souter, and Breyer joined. Because of this United States Supreme Court decision, the holdings of previous cases involving the First Amendment rights of judicial candidates no longer may be sound.

26. *Id.* at 700.

27. *Id.* at 711.

28. *Id.* at 711-712.

29. *Id.* at 702.

30. *White*, 536 U.S. at 702 (citing Minn. Code of Judicial Conduct Canon 5(A)(3)(d) (2002)).

which the candidate would sit if elected.³¹ The court of appeals approved this construction, also holding that the announce clause permitted candidates to participate in "general discussions of case law and judicial philosophy."³² The Minnesota Supreme Court adopted these constructions.³³

However, the United States Supreme Court noted that respondents, responsible for enforcing the Minnesota Code of Judicial Conduct, conceded that the announce clause prohibited candidates from criticizing past court decisions if the candidates also stated that they were not bound by *stare decisis*.³⁴ The Supreme Court stated that limiting the announce clause to issues likely to come before a court was not much of a limitation because the issues raised in an election campaign will be those which are within a state court's purview and that "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."³⁵ Justice Scalia also observed that permitting a discussion of general case law and philosophy was of little help in an election campaign because candidates were prohibited from explaining their judicial philosophy by applying it to issues likely to come before the court.³⁶ He summarized the impact of the announce clause as follows:

[T]he announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.³⁷

The parties agreed that, because of the First Amendment issues involved, the strict scrutiny test applied.³⁸ Thus, to survive constitutional scrutiny under the First Amendment, the announce

31. *Id.*

32. *Id.* at 702-03.

33. *Id.* at 703.

34. *Id.*

35. *Republican Party of Minnesota*, 536 U.S. at 703 (citing *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)).

36. *Republican Party of Minnesota*, 536 U.S. at 703.

37. *Id.* at 703 - 704.

38. *Id.* at 704. In cases where speech restrictions are content-based, the Court applies a strict or exacting scrutiny standard. These restrictions are valid only if "necessary to serve a compelling state interest and...narrowly drawn to that end." See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 798-99 (2d ed. 1988) (quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

clause had to have been “narrowly tailored to serve a compelling state interest.”³⁹ Respondents asserted that the announce clause served two compelling state interests: “preserving the impartiality of the state judiciary and preserving the appearance of impartiality of the state judiciary.”⁴⁰

Justice Scalia discussed three different meanings of “impartiality” in the opinion. The first, that a judge applies the law to all parties the same way, meant that Minnesota Canon was not narrowly tailored to serve the state interest because it prohibited discussion about particular issues, not discussion for or against particular parties.⁴¹ If impartiality meant lack of a preconceived view on particular legal issues, then it could not serve a compelling state interest because impartiality had never been considered necessary for equal justice and it is nearly impossible for a judge not to have preconceived views about the law.⁴² Lastly, if impartiality meant openmindedness, then the Court thought it was unlikely that the Minnesota Supreme Court enacted the announce clause for that purpose because public commitments to legal views were “an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake.”⁴³ The Supreme Court noted that many times before becoming a judge a person makes legal commitments on issues that the person will be faced with as a judge and may have made such legal commitments as a judge, a law teacher, an author, or a speaker.⁴⁴

Justice Scalia went on to note that the Minnesota Code of Judicial Conduct Canon 4B encouraged a judge to teach, write and speak about the law.⁴⁵ Because under the Minnesota Code of Judicial Conduct a judge could make such statements about the law both pre- and (until litigation is pending) post-election the Supreme Court held that “the announce clause was so woefully underinclusive” in serving openmindedness as to make it “a challenge to the credulous” that it was to serve that purpose.⁴⁶ Thus,

39. *White*, 536 U.S. at 704.

40. *Id.* at 704 - 705.

41. *Id.* at 705.

42. *Id.* at 706.

43. *Id.* at 707.

44. *White*, 536 U.S. at 707.

45. *Id.*

46. *Id.* The Supreme Court's decision has brought about several changes in other jurisdictions, including the following: The Alabama Judicial Inquiry Commission withdrew an advisory opinion in which it had stated that a judicial candidate could not answer a questionnaire that asked for the candidate's views and which would be used by an organization in preparing a voter's guide. Alabama Advisory Opinion 00-763. The California

the announce clause was struck down as violative of the First Amendment.

2. *Prior state supreme court and federal court decisions*

Republican Party of Minnesota v. White represented a watershed moment for First Amendment jurisprudence in the area of judicial ethics. However, *White* was not the first case to have addressed this issue in the context of judicial campaign speech. In addition to the United States Supreme Court, several state supreme courts and the lower federal courts have interpreted judicial canons implicating a judge or judicial candidate's First Amendment rights. Prior to *White*, the state and federal courts were split as to the constitutionality of these provisions. The following sections examine these past state and federal court decisions in the shadow of *White*.

a. *State and federal court cases holding judicial campaign speech restrictions unconstitutional*

In *Butler v. Alabama Judicial Inquiry Commission*, the Supreme Court of Alabama held that its canon of judicial ethics, which restricted campaign speech, was unconstitutionally overbroad on its face.⁴⁷ Canon 7B(2) of the Alabama Canons of Judicial Ethics provided:

Commission on Judicial Performance dismissed charges which had been filed against a judge for statements the judge had made during a judicial campaign. *Inquiry Concerning Former Judge Patricia Gray*, dismissal order of August 27, 2002, at www.cjp.ca.gov/pubdisc.htm. The Supreme Court of Missouri has issued an order stating that the "announce clause" would not be enforced. Supreme Court order July 18, 2002, at: <http://www.osca.state.mo.us/sup/index.nsf/d45a7635d4bfd8f8625662000632638/f1c626db4da8b14086256bfa0073b302?OpenDocument>. The Ohio Supreme Court Board of Commissioners on Grievances and Discipline has issued an advisory opinion which contains mandatory speech guidelines for judicial candidates. Ohio Advisory Opinion 2002-8. The Texas Supreme Court amended the Texas Code of Judicial Conduct in several respects, including striking Canon 5(1), which had prohibited statements indicating an opinion "on any issue that may be subject to judicial interpretation" by the office a judge holds or a candidate seeks. The Pennsylvania Supreme Court amended the Pennsylvania Code of Judicial Conduct Canon 7B(1)(c) striking the "announce clause" and inserting language prohibiting a candidate from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." In re: Amendment of Canon 7B(1)(c) of Judicial Conduct, 2002 Pa. LEXIS 3194 (Nov. 21, 2002).

47. *Butler v. Alabama Judicial Inquiry Commission*, 802 So. 2d 207 (Ala. 2001).

Campaign Communications. During the course of any campaign for nomination or election to judicial office, a candidate shall not, by any means, do any of the following:

Post, publish, broadcast, transmit, circulate, or distribute false information concerning a judicial candidate or an opponent, either knowing the information to be false or with reckless disregard of whether the information is false; or post, publish, broadcast, transmit, circulate, or distribute true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person.⁴⁸

Applying strict scrutiny, the Alabama court found a compelling state interest in the challenged provision to protect the reputation and integrity of the judiciary.⁴⁹ However, because the canon's latter clause applied to statements which were not false, but rather that a "reasonable person" would deem "deceiving or misleading," and to statements which the candidate did not make knowing of their falsity, the court found that the canon was overbroad and thus failed strict scrutiny.⁵⁰ Because the Alabama court was ultimately responsible for the rule, the court narrowed the canon to prohibit a judicial candidate from disseminating "[d]emonstrably false information about a judicial candidate or an opponent with knowledge that it is false or with reckless disregard of whether or not it is false."⁵¹

In *Weaver v. Bonner*, the United States Court of Appeals for the Eleventh Circuit held that judicial ethics provisions of the Georgia Code of Judicial Conduct that restricted campaign speech and prohibited candidates from personally soliciting campaign funds and publicly-stated support were unconstitutional.⁵² Canon 7(B)(1)(d) of the Georgia Code of Judicial Conduct provided that judges and candidates for judicial office:

[s]hall not use or participate in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a

48. *Id.* at 213 (citing Alabama Canons of Judicial Ethics Canon 7(B)(1)(d)).

49. *Id.*

50. *Id.* at 217.

51. *Id.* at 218.

52. *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.⁵³

Canon 7(B)(2) of the Georgia Code of Judicial Conduct provided that judges and candidates for judicial office "shall not themselves solicit campaign funds, or solicit publicly stated support."⁵⁴ However, Canon 7(B)(2) further provided that a judicial candidate could establish an election committee to solicit campaign funds and publicly stated support.⁵⁵

The court determined that the canon was subject to strict scrutiny.⁵⁶ The state argued that the canon served the compelling interests of "preserving the integrity, impartiality, and independence of the judiciary" and "ensuring the integrity of the electoral process and protecting voters from confusion and undue influence."⁵⁷ The Eleventh Circuit held that Canon 7(B)(1)(d) was not narrowly tailored to serve the stated interests because it prohibited "false statements negligently made and true statements that [were] misleading or deceptive."⁵⁸

The court went on to declare that the state's interest in judicial impartiality was not "substantially advanced" by the canon.⁵⁹ In the court's view, judicial impartiality was undermined by the *practice* of electing judges, not the judges' conduct during the campaign, because the practice of electing judges provided a motive for judicial candidates to say and do that which would increase the likelihood that they would be elected.⁶⁰ Additionally, the standard for judicial elections should be the same as the standard for legislative and executive elections.⁶¹

Also, because the canon's provisions prohibiting a candidate from personally soliciting campaign funds and publicly stated support were not narrowly tailored to advance the state's interest in judicial impartiality, the provision failed the strict scrutiny test.⁶² The Eleventh Circuit reasoned that the need for campaign

53. *Id.* at 1315 (citing Georgia Code of Judicial Conduct Canon 7(B)(1)(d)).

54. *Weaver*, 309 F.3d at 1315 (citing Georgia Code of Judicial Conduct Canon 7(B)(2)).

55. *Id.*

56. *Weaver*, 309 F.3d at 1319.

57. *Id.*

58. *Id.*

59. *Id.* at 1320.

60. *Id.*

61. *Weaver*, 309 F.3d at 1321.

62. *Id.* at 1322.

funds and endorsements did not imply that candidates who were elected would be partial and the risk of partiality was not reduced significantly by allowing judicial candidates' agents to solicit funds and endorsements.⁶³

The Supreme Court of Michigan considered a similar canon restricting the speech of judicial candidates and held that, because the candidate's right to discuss public issues and advocate his own election was a core First Amendment right, the canon was not narrowly tailored to pass constitutional muster.⁶⁴ The court did find that there were compelling state interests of "preventing fraud and libel;" "preserving the integrity of the election process;" "protecting the process from distortions caused by false statements;" "preserving the integrity of the judiciary;" "preserving public confidence in the judiciary;" "promoting the appearance of fairness and impartiality of the judiciary;" and in "protecting the reputation of the judiciary."⁶⁵ However, because the canon applied to statements that went beyond those government interests, the canon was overbroad.⁶⁶ The Michigan court amended the canon to provide that a candidate for judicial office "should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false."⁶⁷ The court also declared that it would apply an objective standard for determining whether the canon was violated.⁶⁸

In *Beshear v. Butt*, an Arkansas judicial candidate stated that if elected he would not accept "plea bargaining."⁶⁹ A judicial disciplinary proceeding was filed against the candidate, who sought an injunction in federal district court to halt that proceeding.⁷⁰ The court held that overbroad provisions of the Arkansas Code of Judicial Conduct which restricted statements judicial candidates were

63. *Id.* at 1322-23.

64. *In re Chmura*, 608 N.W. 2d 31 (2000), *cert. denied*, 531 U.S. 828 (2000). The canon at issue provided that:

a candidate for judicial office, including an incumbent judge, should not use or participate in the use of any form of public communication that the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading, or which is likely to create an unjustified expectation about results the candidate can achieve.

Id. (citing Canon 7(B)(1)(d) of the Michigan Code of Judicial Conduct).

65. *Chmura*, 608 N.W. 2d at 40.

66. *Id.*

67. *Id.* at 43.

68. *Id.* at 43-44.

69. *Beshear v. Butt*, 863 F. Supp. 913, 914 (E.D. Ark. 1994).

70. *Id.* at 915.

permitted to make violated the First Amendment of the United States Constitution by chilling the exercise of the judicial candidate's constitutional rights.⁷¹

In *Buckley v. Illinois Judicial Inquiry Bd.*, the United States Court of Appeals for the Seventh Circuit held that an Illinois rule limiting statements that a judicial candidate could make while campaigning violated the First Amendment.⁷² The rule at issue was similar to the announce clause later struck down by the United States Supreme Court in *White*. The district court had construed the portion of the rule prohibiting candidates from stating their views on disputed legal or political issues as being restricted to statements on issues likely to come before the judge in a case.⁷³

The court of appeals noted that the Illinois rule was designed to prevent candidates from making commitments to decide particular cases in a certain way because candidates would be pressured to rule that way if they won the election.⁷⁴ Such pressure would im-

71. *Id.* at 917-18. The provisions of the Arkansas Code were: Canon 7(B)(1)(c) of the Arkansas Code of Judicial Conduct states:

A candidate, including an incumbent judge, for a judicial office

* * *

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce views on disputed legal or political issues; or, knowingly misrepresent his identity, qualifications, present position or other fact.

Id. at 916 (citing Arkansas Code of Judicial Conduct Canon 7(B)(1)(c)).

Canon 5 (A)(3)(d) of the Revised Arkansas Code of Judicial Conduct, adopted in 1993, states:

A candidate for a judicial office:

(d) shall not:

(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
(ii) announce views on disputed legal or political issues; or
(iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

Beshear, 863 F. Supp. at 916 (citing Revised Arkansas Code of Judicial Conduct Canon 5(A)(3)(d)).

72. *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993). The provision at issue was Illinois Supreme Court Rule 67(B)(1)(c), which provides, in part:

a candidate, including an incumbent judge, for a judicial office filled by election or retention...should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity...or other fact; provided, however, that he may announce his views on measures to improve the law, the legal system, or the administration of justice, if, in doing so, he does not cast doubt on his capacity to decide impartially any issue that may come before him.

Buckley, 997 F.2d at 225 (citing Illinois Supreme Court Rule 67(B)(1)(c)).

73. *Buckley*, 997 F.2d at 226.

74. *Id.* at 228.

pair the judge's ability to decide impartially and would impair the credibility of the judge's decision to the losing party and to the community.⁷⁵ The court acknowledged that the problem with drafting such a rule was that commitments could be both explicit and implicit.⁷⁶ The court recognized that a candidate, without making explicit commitments or taking sides, could be perceived by voters as advancing a certain position, even though the candidate did not expressly make a pledge, promise, or commitment.⁷⁷

The court observed that the pledges or promises clause of the Illinois rule banned all pledges or promises, even those which did not pledge to decide a particular case a particular way and the announce clause was not limited to announcements that the candidate would decide a particular case a particular way.⁷⁸

The court held that the rule was overbroad in violation of the First Amendment.⁷⁹ The Seventh Circuit additionally noted that anything a candidate said about disputed legal or political issues could be interpreted as compromising the candidate's ability to try cases impartially.⁸⁰ Moreover, the district court's attempt to save the rule by adding language was unsuccessful because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."⁸¹

Kentucky's Code of Judicial Conduct has been challenged in several fora. In *J.C.J.D. v. R.J.C.R.*, the Supreme Court of Ken-

75. *Id.*

76. *Id.*

77. *Id.*

78. *Buckley*, 997 F.2d at 228.

79. *Id.* at 231.

80. *Id.* at 229.

81. *Id.* Although counsel requested the court make additional revisions to the rule to restrict its reach, the court held that it was not authorized to do so. *Id.* at 230. In *American Civil Liberties Union of Florida, Inc. v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990), a Florida federal district court also considered a similar judicial canon and determined that it violated the First Amendment rights of judicial candidates. Canon 7(B)(1)(c) of the Florida Code of Judicial Conduct provided that:

A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election ... should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

ACLU of Florida, 744 F. Supp. at 1096 (citing Florida Code of Judicial Conduct Canon 7(B)(1)(c)). The court held that, except for information about the candidates' background, this canon effectively proscribed announcements on almost every issue that might be of interest to the public and the candidates in a judicial race. *ACLU of Florida*, 744 F.Supp. at 1098.

tucky held that certain provisions of the Kentucky Code of Judicial Conduct Canon 7B(1), a version of Kentucky's "pledges and promises" and announce clauses, violated the First Amendment.⁸² Although the court agreed that the state had a compelling interest in protecting and preserving the "integrity and objectivity of the judicial system," it found that the canon was not narrowly tailored and instead banned all statements of a candidate's views on disputed legal or political questions.⁸³

In *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, a judicial candidate challenged the same canon's speech restrictions.⁸⁴ The candidate desired to make "pledges, promises and statements which would commit or appear to commit him with respect to administrative matters..." These matters included an alleged backlog of cases, methods of assignment of cases, numbers of pending cases, hiring and firing of employees, and administrative expenses relating to travel.⁸⁵ The candidate also desired "to make statements which would commit or appear to commit him on general legal issues which were not presently before the Kentucky Court of Appeals" in any identifiable cases.⁸⁶ "Such issues included a general discussion of the right of privacy,

82. *J.C.J.D. v. R.J.C.R.*, 803 S.W. 2d 953 (Ky. 1991), *cert. denied sub nom.* *Judicial Retirement & Removal Comm'n v. Combs*, 502 U.S. 816 (1991). Kentucky Code of Judicial Conduct Canon 7B (1) provided, in pertinent part, that a candidate for judicial office "should maintain the dignity appropriate to judicial office, ... [and] should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of office; [or] announce his views on disputed legal or political issues..." *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d at 955.

83. *Id.* at 956.

84. *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Ky. 1991). The canon at issue, Kentucky Code of Judicial Conduct Canon 7B(1), provided:

CANON 7: A judge should refrain from political activity inappropriate to his judicial office.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent his identity, qualifications, present position, or other facts.

Ackerson, 776 F. Supp. at 311 (citing Kentucky Code of Judicial Conduct Canon 7(B)(1)).

85. *Ackerson*, 776 F. Supp. at 311.

86. *Id.*

the role of United States Supreme Court precedent, and the adoption of federal evidence rules in Kentucky state courts.”⁸⁷

The Kentucky district court stated that “[w]hile candidates for elective judicial office are not without the protection of the First Amendment, their campaign conduct has been regulated to a greater degree than non-judicial candidates.”⁸⁸ That being said, the court held that, because it did not impinge upon the impartiality of the judiciary, the state had no compelling interest to restrict a judicial candidate’s speech on administrative matters.⁸⁹ The Kentucky District Court rejected the candidate’s other constitutional challenges on the ground that the canon prohibiting speech-making commitments about legal issues which were likely to come before the court withstood the strict scrutiny test.⁹⁰ The Kentucky Supreme Court upheld the *Ackerman* rationale in two later cases.⁹¹

The Pennsylvania Court of Judicial Discipline considered the effect of the First Amendment in *In re Miller*, where a complaint was filed against a judicial candidate alleging that the candidate misrepresented his qualifications and position.⁹² Canon 7 of the Pennsylvania Code of Judicial Conduct provided, in relevant part “[a] candidate...for a judicial office that is filled...by public election between competing candidates...should not...misrepresent his identity, qualifications, present position, or other fact.”⁹³ The court found that there were not misrepresentations, and thus there was no need to address the constitutional issues. The majority observed, however, that to comply with the First Amendment, the ban of Canon 7B(1)(c) could not be extended beyond “false campaign statements knowingly or recklessly made.”⁹⁴ Therefore, the majority stated that banning the following would violate the First Amendment:

- a. [presumably] false statements negligently made,

87. *Id.*

88. *Id.* at 313. This is contrary to the Eight Circuit holding in *Suster v. Marshall*, 149 F.3d 523, discussed *infra* note 123 and accompanying text.

89. *Ackerson*, 776 F.Supp. at 314.

90. *Id.* at 315.

91. *Summe v. Judicial Retirement and Removal Commission*, 947 S.W.2d 42 (Ky. 1997) and *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Ky. 1994), *cert. denied*, 513 U.S. 871 (1994).

92. *In re Miller*, 759 A.2d 455, 457 (Pa. Ct. Jud. Disc. 2000).

93. *Id.* at 458 (citing Pennsylvania Code of Judicial Conduct Canon 7).

94. *Miller*, 759 A.2d at 467-68, (citing Leadbetter, J., concurring).

- b. truthful statements "carelessly or incompletely communicated,"
- c. "technically truthful [statements] which mislead the recipient,"
- d. truthful statements "which the maker knows or believes to be materially misleading because of [their] failure to state additional or qualifying matter,"
- e. [presumably] false statements made with a degree of mental culpability less than that required for negligent statements,
- f. "half-truths,"
- g. "misleading generalizations,"
- h. "materials which might have any tendency to be misunderstood."⁹⁵

b. State and federal court cases upholding restrictions on judicial campaign speech

In *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, the United States Court of Appeals for the Third Circuit held that a Pennsylvania Code of Judicial Conduct provision limiting a judicial candidate from announcing his views on disputed legal and political issues and prohibiting a judicial candidate from personally soliciting campaign funds did *not* violate the First Amendment.⁹⁶ The Third Circuit agreed with the defendants that the "disputed legal or political issues" of the disputed canon included only those issues likely to come before the court and additionally predicted that the Pennsylvania Supreme Court would construe the canon with that limitation.⁹⁷ The court went on to decide that, with the limitation, the canon's announce clause did not violate the First Amendment.⁹⁸

95. *Id.* at 468 (footnotes omitted). The concurring opinion would permit the regulation of this campaign speech believed by the majority to be protected by the First Amendment.

96. *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991). Pennsylvania Code of Judicial Conduct Canon 7 provides, in pertinent part: B. Campaign Conduct.

(1) A candidate ... for a judicial office ...

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

Stretton, 944 F.2d at 141 (citing Pennsylvania Code of Judicial Conduct (1974)).

97. *Stretton*, 944 F.2d at 142-44.

98. *Id.* at 144.

In analyzing the ban that prevented a candidate from personally soliciting campaign funds, the court agreed with the district court's analysis that there were "compelling state interests in preventing the reality and appearance of political corruption as well as in the necessity of assuring an impartial judiciary."⁹⁹ The candidate argued that "since candidates are permitted to participate indirectly in the solicitation of funds, and they inevitably learn who did, or did not, contribute, it is but a tiny and credible step to allow direct personal participation."¹⁰⁰ However, the court found that the canon was sufficiently tailored to survive First Amendment attack.¹⁰¹

The Delaware Supreme Court upheld a Code of Judicial Conduct provision which prohibited a judge from attending political gatherings in *Matter of Buckson*.¹⁰² The provision had been challenged as void for vagueness as applied to the judge's activities.¹⁰³ The judge, after publicly announcing his intention to seek the nomination for Delaware governor, attended various political caucuses.¹⁰⁴ The court held that as applied to the judge's conduct, the term "political gathering" was sufficiently definite to withstand a void for vagueness challenge.¹⁰⁵

The United States District Court for the Southern District of Ohio found that Ohio's announce clause passed constitutional scrutiny in *Berger v. Supreme Court of Ohio*.¹⁰⁶ The court held

99. *Id.* at 145. The Third Circuit cited the Pennsylvania Code of Judicial Conduct Canon 7(B)(2) as providing "that a candidate 'should not himself solicit or accept campaign funds.'" *Id.* at 145 (citing Pennsylvania Code of Judicial Conduct (1974)).

100. *Stretton*, 944 F.2d at 145

101. *Id.* at 146.

102. 610 A.2d 203 (Del. 1992).

103. The Delaware Code of Judicial Conduct provided in pertinent part:

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. A judge should not:

(3) Solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

Id. at 206-07.

104. *Buckson*, 610 A.2d at 208.

105. *Id.* at 224-25. The *Buckson* court also upheld a Code of Judicial Conduct provision that required a judge to resign to run for non-judicial office. For a further discussion of this issue, see Section IV (E) *infra*, particularly the discussion of *Morial v. Judiciary Commission of State of Louisiana*.

106. 598 F.Supp. 69 (S.D. Ohio 1984), *aff'd*, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989). The district court opinion is discussed because the court of appeals *per curiam* opinion is relatively brief. Ohio's announce clause provided:

that the canon did not prohibit a candidate from criticizing court administration or an incumbent judge if the criticism was not untrue and was not misleading.¹⁰⁷ The district court held that a candidate could pledge "to increase the judge's personal involvement in the administration and resolution of cases, and to attempt to encourage more direct dispute resolution among the parties themselves."¹⁰⁸ The court rejected the argument that the pledges clause of the canon was unconstitutionally void for vagueness.¹⁰⁹

In addition to the First Amendment argument in *Berger*, the plaintiff contended that the canon violated equal protection because it treated judges differently from legislators and members of the executive branch.¹¹⁰ In court's opinion, however, because "[a] judge acts on individual cases, not broad programs," it was not appropriate for a judge to make pledges or promises that legislative and executive candidates could make.¹¹¹

In *In re Kaiser*, the Supreme Court of Washington held that some of a judicial candidate's statements were protected by the First Amendment and others were not.¹¹² The court cited the Washington Code of Judicial Conduct Canon 7(B)(1)(d) as prohibiting a judicial candidate from engaging in "false, misleading, or deceptive campaign advertising."¹¹³ The court held that, under the First Amendment, a candidate could not be disciplined for false statements unless the candidate actually knew the statements were false.¹¹⁴ However, the court held that imposing discipline on a candidate who violated those canons which: (1) prevented identification with a political party;¹¹⁵ (2) required the candidate to

A candidate, including an incumbent judge, for a judicial office:

....

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

Berger, 598 F.Supp. at 71 (citing Ohio Code of Jud. Conduct, Canon 7(B)(1)(c)).

107. *Berger*, 598 F. Supp. at 75.

108. *Id.*

109. *Id.*

110. *Id.* at 76.

111. *Id.*

112. *In re Kaiser*, 759 P.2d 392 (Wash. 1988).

113. *Id.* at 397 (citing Wash. CJC Canon 7(B)(1)(d)).

114. *Kaiser* 759 P.2d at 398-99.

115. *Id.* at 395. Washington Code of Judicial Conduct Canon 7(A)(2) provides in part: "[t]he judge or candidate shall not identify himself as a member of a political party." *Id.* (citing Wash. CJC Canon 7(A)(2)).

"maintain the dignity appropriate to judicial office...";¹¹⁶ (3) required the candidate to "respect and comply with the law";¹¹⁷ and (4) prevented "pledges or promises of conduct in office other than the faithful and impartial performance of ... duties and preventing the announc[ing of] views on disputed legal or political issues" were compelling state interests.¹¹⁸

Because these interests were determined to be compelling, the court stated it required "a fairly tight fit between means and ends to withstand constitutional scrutiny."¹¹⁹ The plaintiff judge conceded that the canons were facially valid and instead unsuccessfully argued that they were unconstitutional as applied to him.¹²⁰ The court held that statements that the judge was a "tough no-nonsense judge" were protected by the First Amendment because they related to qualifications.¹²¹ In contrast, the court held that other statements were not protected by the First Amendment, including a statement that implied the judge's party affiliation, statements that the judge was "toughest on drunk driving," and statements that the judge's opponent received most of his financial support from drunk driver defense attorneys, whose "primary interests are getting their clients off."¹²²

B. Campaign Activities

Another source of tension between judicial ethics provisions and the First Amendment has been in the area of campaign activities.

116. *Kaiser*, 759 P.2d at 396. Washington Code of Judicial Conduct Canon 7(B)(1)(a) provides in part: "A candidate, including an incumbent judge ... should maintain the dignity appropriate to judicial office." *Id.* (citing Wash. CJC Canon 7(B)(1)(a)).

117. *Kaiser*, 759 P.2d at 396. Washington Code of Judicial Conduct Canon 2(A) provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Id.* (citing Wash. CJC Canon 2(A)).

118. *Kaiser*, 759 P.2d at 395. Washington Code of Judicial Conduct Canon 7(B)(1)(c) provides in part: "(1) A candidate, including an incumbent judge ... (c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announce his views on disputed legal or political issues." *Id.* (citing Wash. CJC Canon 7(B)(1)(c)). The Washington Code also provides in its first canon the state's interests for maintaining the judicial canons: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved." Washington Code of Judicial Conduct Canon 1.

119. *Kaiser*, 759 P.2d at 399.

120. *Id.* at 400.

121. *Id.*

122. *Id.* at 395-96, 400.

Several courts have considered challenges to campaign restrictions as violative of the judicial candidate's First Amendment rights.

In *Suster v. Marshall*, the United States Court of Appeals for the Sixth Circuit was faced with a First Amendment challenge to two Ohio Judicial Canons. The court determined that the first, Judicial Canon VII(C)(6), which limited the amount of money a candidate could spend in a judicial campaign, violated the First Amendment.¹²³ The Eighth Circuit found that a candidate did not waive his or her First Amendment rights simply because he or she decided to seek a judicial office, rather than a non-judicial one.¹²⁴ The opinion further stated that the only state interest compelling enough to infringe upon the First Amendment rights of a candidate was the prevention of corruption or the appearance of corruption.¹²⁵ Because the canon was not narrowly tailored to avoid corruption or the appearance of corruption, it was not the least restrictive means to achieve the state's interest. Rather, a limit on campaign contributions would provide a less restrictive means to that end.¹²⁶

The court held that the second challenged provision, Ohio's Canon VII(C)(8), which prohibited candidates from using money

123. *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998), *cert. denied* 525 U.S. 1114 (1999). Ohio Judicial Canon VII (C) (6) stated, in part,

The total amount of expenditures made in the fund raising period allowed by division (C) (4) of this Canon by the campaign committee of a judicial candidate shall not exceed the following:

- (a) Five hundred thousand dollars in the case of a judicial candidate for chief justice of the Supreme Court;
- (b) Three hundred fifty thousand dollars in the case of a judicial candidate for justice of the Supreme Court;
- (c) One hundred thousand dollars in the case of a judicial candidate for the court of appeals;
- (d) Seventy-five thousand dollars in the case of a judicial candidate for the court of common pleas;
- (e) Fifty thousand dollars in the case of a judicial candidate for municipal or county court.

Suster, 149 F.3d at 525 n.1 (citing Ohio Code of Jud. Conduct, Canon VII(C)(6)). Because the canon was amended after the trial court had ruled, the Court of Appeals would only review for appropriateness of the district court's action under the former version of the canon and remanded the case for the trial court to consider the constitutionality of the amended version of Canon VII(C)(6). *Suster*, 149 F.3d at 525.

124. *Id.* at 529.

125. *Id.* at 532 (citing *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985)).

126. *Suster*, 149 F.3d at 533. On remand, the District Court held that the revised version of Canon VII(C)(6), which limited expenditures in varying amounts based on the population in the election district also violated the First Amendment. *Suster v. Marshall*, 121 F. Supp.2d 1141 (N.D. Ohio 2000).

raised in a previous non-judicial campaign in a subsequent judicial campaign, *was* constitutional.¹²⁷ The court determined that Canon VII(C)(8) was narrowly tailored to avoid corruption or the appearance of corruption because it prevented judicial candidates from using funds which may have been part of a candidate's agreement (in the non-judicial election) to advance or take on some political issue or cause.¹²⁸

In *Zeller v. The Florida Bar*, the United States District Court for the Northern District of Florida held that certain provisions of the Florida Code of Judicial Conduct, which limited the time for spending campaign funds, establishing a campaign committee, soliciting public support, and soliciting campaign contributions to one year before an election violated the First Amendment.¹²⁹ The defendants in *Zeller* conceded that the restrictions on spending judicial campaign funds and soliciting public support (including the establishment of a committee to solicit such support) were facially unconstitutional.¹³⁰ The court thus focused on whether the ban on soliciting contributions for a judicial campaign earlier than one year before the general election, including establishing a committee to solicit such contributions, was constitutional.¹³¹

The district court noted that two First Amendment rights were restricted: the right of political expression of supporters to solicit the public for contributions and the right of political association of supporters to contribute funds.¹³² Thus, under the Supreme

127. *Suster*, 149 F.3d at 534.

128. *Suster*, 149 F.3d at 534.

129. *Zeller v. The Florida Bar*, 909 F.Supp. 1518 (N.D.Fla. 1995). The Florida Code of Judicial Conduct, Canon 7(C)(1) provided that:

A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law. A candidate should not expend funds in furtherance of his or her judicial campaign or establish a committee to solicit contributions or public support *earlier than one year before the general election.*

Zeller, 909 F.Supp. at 1520 (*citing* Florida Code of Judicial Conduct Canon 7(C)(1) (*emphasis added*)).

Florida Code of Judicial Conduct Canon 7(A)(3)(c) additionally mandates "that all judges and judicial candidates 'shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon.'" *Zeller*, 909 F.Supp. at 1520-21 (*citing* Florida Code of Judicial Conduct Canon 7(A)(3)(c)).

130. *Zeller*, 909 F.Supp. at 1522-23.

131. *Id.* at 1523.

132. *Id.* at 1524.

Court's decision in *Buckley v. Valeo*, canons restricting political expression would be subject to "exacting scrutiny" while the restrictions on political association would be permissible "if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."¹³³ The district court held that the state's admittedly compelling interests of avoiding corruption or the appearance of corruption were not sufficiently connected to the ban on soliciting campaign contributions for a long time without contributing to corruption.¹³⁴ The court held that many other less restrictive means of advancing the State's interests were already in place and thus the provisions of the canons were unconstitutional.¹³⁵

In *In re Fadeley*, the Oregon Supreme Court considered a provision of Oregon's Code of Judicial Conduct which prohibited a judicial candidate from personally soliciting campaign contributions.¹³⁶ The court noted that seeking funds for elective office was political speech protected by the First Amendment and subject to exacting scrutiny.¹³⁷ The provision was upheld as against a First Amend-

133. *Id.* at 1523-24 (quoting *Buckley v. Valeo*, 424 U.S. 1 (1976)).

134. *Zeller*, 909 F. Supp. at 1525.

135. *Id.* at 1527-28. Judicial candidates are proscribed from participating in partisan political activity, Fla. Stat. 105.071 (1993); Florida Code of Judicial Conduct Canons 7A(1), 7C(3), as well as from accepting the assistance of partisan political organizations. See Fla. Stat. 105.09. In addition, judicial candidates cannot "make pledges or promises of conduct in office," or "make statements that commit or appear to commit ... to cases controversies or issues that are likely to come before the court." Florida Code of Judicial Conduct Canon 7A(3)(d). Furthermore, judicial candidates are foreclosed from personally soliciting campaign funds, and must instead establish separate committees to solicit for and collect campaign contributions. *Id.* at Canon 7C(1). Judicial candidates must also comply with state campaign finance disclosure laws. See Fla. Stat. 105.08(1); Fla. Stat. ch. 106. Finally, the Judicial Code provides that sitting judges should keep informed about their financial interests, and disqualify themselves "in a proceeding in which the judge's impartiality might reasonably be questioned ..." Florida Code of Judicial Conduct Canon 3E. *Id.*

136. 802 P.2d 31 (1990). Canons 7B(7) and 7D of the Oregon Code of Judicial Conduct provide:

7B. A judge may not:

(7) personally solicit campaign contributions; but a judge may establish committees to secure and manage financing and expenses to promote the judge's election and to obtain public statements of support for the judge's candidacy;

7D. The provisions of this canon apply to each judge in the state at all times and to any other person who becomes a candidate for an elective judicial office. A person becomes a candidate for an elective judicial office when the person announces the candidacy or when steps are taken, with the person's approval, to place his or her name on an election ballot.

Fadeley, 802 P.2d at 36 (citing Oregon Code of Judicial Conduct Canon 7B).

137. *Fadeley*, 802 P.2d at 41 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). (Regulation of the speech involved in campaign funds "may be sustained if the State demonstrates

ment challenge because the state's interest in the integrity and the appearance of integrity of the judiciary justified the regulation.¹³⁸

C. *Non-Campaign Speech*

The previous cases focused on judicial speech within the confines of judicial elections. The following cases examine the constitutionality of speech restrictions imposed on judges while in office.

In *In re Sanders*, the Supreme Court of Washington held that the First Amendment precluded disciplining a Supreme Court justice who, minutes after being sworn into office, had spoken to a pro-life rally which was held nearby and had left after speaking.¹³⁹

The disciplinary body in *Sanders* decided that the justice had violated multiple canons of the Washington Code of Judicial Conduct.¹⁴⁰ The court found that "Canon 1 embodies the interests

a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.") *Fadeley*, 802 P.2d at 41.

138. *Fadeley*, 802 P.2d at 44.

139. *In re Sanders*, 955 P.2d 369 (Wash. 1998).

140. *Id.* at 372, 376. The Canons involved were Canons 1, 2(B) and 7(A)(5).

Washington Code of Judicial Conduct Canon 1:

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Id. at 372 (citing Washington Code of Judicial Conduct Canon 1).

Washington Code of Judicial Conduct Canon 2(B):

Judges should not allow family, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

Sanders, 955 P.2d at 376 (citing Washington Code of Judicial Conduct Canon 2(B)).

Washington Code of Judicial Conduct Canon 7(A):

(A) Political Conduct in General.

(1) Judges or candidates for election to judicial office shall not:

- (a) act as leaders or hold any office in a political organization;
- (b) make speeches for a political organization or nonjudicial candidate or publicly endorse a nonjudicial candidate for public office;
- (c) solicit funds for or pay an assessment or make a contribution to a political organization or nonjudicial candidate;
- (d) attend political functions sponsored by political organizations or purchase tickets for political party dinners or other functions, except as authorized by Canon 7(A)(2);
- (e) identify themselves as members of a political party, except as necessary to vote in an election;
- (f) contribute to a political party, a political organization or nonjudicial candidate.

against which a judge's First Amendment rights must be balanced, but in this case it is these rights and interests that are in conflict."¹⁴¹ The Washington Supreme Court went on to observe that Canon 7(A)(5)'s ban on political activity must be considered in light of Canon 1's requirement that judges act to maintain an impartial judiciary.¹⁴² Because First Amendment rights were at issue, labeling conduct as "political or nonpolitical, partisan or non-partisan, controversial or non-controversial" was not determinative of whether Canon 7(A)(5) was violated.¹⁴³ Instead the rights and interests of the judge must be identified and balanced against the interests of the state.¹⁴⁴ Thus,

[t]he competing interests at stake here are the government's interest in a fair and impartial judiciary, a judge's interest in the right to express his or her views, and the need for the free expression of those views in a system wherein members of the judiciary are elected to office by the vote of the people. The interest embodied in Canon 1 of the Code of Judicial Conduct calls upon judges to preserve the integrity and impartiality of the judiciary by establishing, maintaining, and enforcing high standards of judicial conduct. Without question, this interest is compelling.¹⁴⁵

However, this court stated (like several cases above) that persons do not lose their First Amendment rights when they become judges; thus, the restriction on First Amendment activities must

(2) during judicial campaigns, judges or candidates for election to judicial office may attend political gatherings, including functions sponsored by political organizations, and speak to such gatherings on their own behalf or that of another judicial candidate.

(3) Judges may contribute to, but shall not solicit funds for another judicial candidate.

(4) Judges shall resign from office when they become candidates either in a primary or in a general election for a nonjudicial office, except that they may continue to hold office while being a candidate for election to or serving as a delegate in a state constitutional convention, if they are otherwise permitted by law to do so.

(5) Judges should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice.

Sanders, 955 P.2d at 372, n.2 (citing Washington Code of Judicial Conduct Canon 7(A)).

141. *Sanders*, 955 P.2d at 372.

142. *Id.* at 373.

143. *Id.* at 374.

144. *Id.*

145. *Id.* (citations omitted).

survive strict scrutiny.¹⁴⁶ Moreover, because judicial discipline was involved, the state's restriction was subject to even "stricter scrutiny."¹⁴⁷ The court required "clear and convincing evidence of conduct that threatened or compromised the integrity or appearance of impartiality of the judiciary."¹⁴⁸ Because there was no evidence that the judge's conduct constituted an express or implied promise to decide any issues in a particular way, or to be impartial, this conduct did not violate the canon.¹⁴⁹ Additionally, Canon 2(B) was not violated because the justice did not use his judgeship to achieve an "economic or other advantage" for himself or another by attending and speaking at the rally.¹⁵⁰

In *In re Schenck*, the Supreme Court of Oregon held that Oregon Code of Judicial Conduct Canons 1, 2A, 3C(1), and 3A(6) did not violate the United States Constitution.¹⁵¹ The court upheld the imposition of discipline against a judge who failed to disqualify himself from a proceeding where his impartiality was called into question on the basis of past run-ins with an attorney who had filed an ethics complaint against him. After a lawyer filed an ethics complaint against a judge, the judge had harsh words with the lawyer in private, publicly criticized the lawyer, and publicly

146. *Sanders*, 955 P.2d at 374-375.

147. *Id.* at 375-76.

148. *Id.* at 376.

149. *Id.*

150. *Id.* at 377.

151. *In re Schenck*, 870 P.2d 185 (Or. 1994), *cert. denied*, 513 U.S. 71 (1994). Oregon Code of Judicial Conduct Canon 1 provided:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing, and should observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 189 (citing Oregon Code of Judicial Conduct Canon 1).

Oregon Code of Judicial Conduct Canon 2A provided "[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *Schenck*, 870 P.2d at 189 (citing Oregon Code of Judicial Conduct Canon 2A)

Oregon Code of Judicial Conduct Canon 3C(1) provided, in part, "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..." *Schenck*, 870 P.2d at 190 (citing Oregon Code of Judicial Conduct Canon 3C(1)).

Oregon Code of Judicial Conduct Canon 3A(6) provided:

A judge should abstain from public comment about pending or impending proceedings in any court and should require similar abstention on the part of court personnel subject to the judge's discretion and control. This subsection does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court.

Schenck, 870 P.2d at 200 (citing Oregon Code of Judicial Conduct Canon 3A(6)).

stated that the ethics complaint had no merit.¹⁵² The lawyer then filed a motion to disqualify the judge from acting in a case in which the lawyer represented a party.¹⁵³ The judge denied the motion.¹⁵⁴ The next time the lawyer represented a party before the judge, the lawyer filed another motion to disqualify.¹⁵⁵ In opposing discipline for denying the motion to disqualify, the judge argued that Canon 3C(1) violated the Fourteenth Amendment due process clause because it did not give adequate notice of the conduct which it banned.¹⁵⁶ The court rejected the argument because the canon merely required the judge to determine whether there was an "objective factual basis for a party or lawyer reasonably to question the judge's impartiality."¹⁵⁷

The judge also made public comments in a letter to the editor and in a guest editorial about pending or impending cases and about the lack of competence, experience, maturity, and professional demeanor of the District Attorney.¹⁵⁸ The judge argued that the First Amendment, and the Oregon state equivalent thereof,¹⁵⁹ prohibited disciplining him under Canons 1, 2A and 3A(6) for these statements.¹⁶⁰

The court disagreed.¹⁶¹ It noted that the First Amendment issues could be analyzed under two lines of First Amendment cases: cases involving matters of public concern,¹⁶² or cases involving public employee speech.¹⁶³ The court stated that it would reach the same result regardless of which line of cases it used, but the court used the public employee speech cases.¹⁶⁴

In public employee speech cases, the public employee's right to comment on matters of public interest must be weighed against "the interest of the state as an employer in regulating the speech of its employees, to promote the efficiency of the public services

152. *Schenck*, 870 P.2d at 189-90, 200.

153. *Id.* at 191.

154. *Id.* at 191.

155. *Id.* at 194.

156. *Id.* at 195.

157. *Schenck*, 870 P.2d at 196.

158. *Id.* at 200.

159. OR. CONST. art. I, §8.

160. *Schenck*, 870 P.2d at 202.

161. *Id.* at 204.

162. *Id.* See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

163. *Schenck*, 870 P.2d at 204. See, e.g., *Pickering v. Board of Education*, 391 U.S. 563 (1968).

164. *Schenck*, 870 P.2d at 204.

the state performs through its employees.”¹⁶⁵ In holding that there was no violation of the First Amendment, the court stated: “[t]he limitation on speech in this case is directly related to, and is narrowly drawn so as to further, the governmental interest in maintaining the fact and the appearance of an impartial judiciary, and is justified by the profound nature of that interest.”¹⁶⁶

The Supreme Court of Appeals of West Virginia discussed a judge’s First Amendment right to speak publicly about a past disciplinary proceeding against him in *In re Hey*.¹⁶⁷ In a radio interview, the judge stated that a member of a hearing board who had recommended the judge be censured for statements the judge had made on a television show walked out while the hearing board viewed a videotape of the television show.¹⁶⁸ The judge also stated that he was “not done with her [the board member] yet.”¹⁶⁹ As a result of the judge’s statements on the radio, charges were filed against the judge alleging that he violated Canon 1, Canon 2A, and Canon 3A(6) of the West Virginia Judicial Code of Ethics, which were very similar to the canons discussed in *Schenck*.¹⁷⁰ The board that heard the charges recommended they be dismissed. The court agreed, finding that there was insufficient evidence of any violation.¹⁷¹ Nevertheless, because of the “vital im-

165. *Id.*, citing *Pickering*, 391 U.S. 563, 588.

166. *Schenck*, 870 P.2d at 205.

167. 452 S.E.2d 24 (W.Va. 1994).

168. *Id.* at 27.

169. *Id.*

170. *Id.* at 26. West Virginia Judicial Code of Ethics Canon 1 provided:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 28, n.4 (citing West Virginia Judicial Code of Ethics Canon 1).

West Virginia Judicial Code of Ethics Canon 2A provided “[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *Hey*, 452 S.E.2d at 28, n. 4 (citing West Virginia Judicial Code of Ethics Canon 2A).

West Virginia Judicial Code of Ethics Canon 3A(6) of the Judicial Code of Ethics provided:

A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Hey, 452 S.E.2d at 29, n.4 (citing West Virginia Judicial Code of Ethics Canon 3A(6)).

171. *Hey*, 452 S.E.2d at 27-29.

portance" of the First Amendment issue, the court decided to address it.¹⁷²

In *Hey*, the court noted that it had the power to discipline judges, but also had the "duty not to ignore judges' constitutionally protected rights."¹⁷³ The court held that the state's interests were adequately served by specific prohibitions of the canons so that the general prohibitions in Canons 1, 2, and 3 of the Judicial Code of Ethics (and now the Code of Judicial Conduct) could not be used to punish judges for their public remarks that did not concern a pending or impending matter and that did not violate either a specific prohibition or some other law.¹⁷⁴

The court remarked regarding judicial disciplinary matters:

Where the judge himself (or herself) is the target and his professional reputation and possibly his career are at stake, fairness to him and promotion of the search for truth in the public marketplace require that he have the right to respond and defend himself in the public debate as well as in formal proceedings. That is especially so in West Virginia, where judges are elected officials. A judge depends on public opinion to remain in his job, and the public needs balanced information about its judges to make informed decisions at the polls. The formal proceedings of the Judicial Hearing Board do not, by themselves, provide an accused judge with a sufficient forum to influence public perceptions, nor do they provide the end-all for the public's need to know about a judge's conduct.¹⁷⁵

Finding that Canons 1 and 2 were not facially unconstitutional, the court commented that the vagueness of Canons 1, 2 and 3 could discourage some "from engaging in what would be protected expression and also depriv[e] the public of their contributions."¹⁷⁶

In *In re Broadbelt*, the New Jersey Supreme Court upheld a challenge that Canon 3A(8) and 2B violated the First Amendment when applied to prohibit a New Jersey judge from appearing on television to comment on the O. J. Simpson case which was pending in California.¹⁷⁷ The court discussed the different tests which

172. *Id.* at 29.

173. *Id.*

174. *Id.* at 30.

175. *Id.* at 32.

176. *Hey*, 452 S.E.2d at 33.

177. *In re Broadbelt*, 683 A.2d 543 (1996). The New Jersey Code of Judicial Conduct Canon 3A(8) provided that:

had been applied to determine the constitutionality of a statute implicating First Amendment rights.

The New Jersey court considered a number of tests used to determine the constitutionality of restrictions on First Amendment rights. The *Pickering* test determines “whether the speech addresses a matter of legitimate public concern,” and “whether the public employee’s right to speak freely outweighs the public employer’s interest in regulating the speech to promote the efficiency of the public services it performs.”¹⁷⁸ The strict scrutiny test requires that the state statute be “narrowly tailored to serve a compelling governmental interest” and use “the least restrictive means available to achieve that interest.”¹⁷⁹ A hybrid *Pickering*/strict-scrutiny test determines “(1) whether the state could accomplish its legitimate interest in restraining a judge’s speech through narrowly-tailored limitations, and (2) whether the regulation exceeded that which is necessary to accomplish the state’s interests.”¹⁸⁰ In the end, the court applied the *Gentile/Hinds* test which determines whether a state statute “furthers a substantial governmental interest unrelated to suppression of expression, and is no more restrictive than necessary.”¹⁸¹ The court held that “[t]he preservation of the independence and integrity of the judiciary and the maintenance of public confidence in the judiciary—the interests underlying Canons 3A(8) and 2B” were sufficient to uphold the canons.¹⁸²

The Supreme Court of Wisconsin considered a judicial ethics provision which prohibited a judge from commenting on the merits

A judge should abstain from public comment about a pending or impending proceeding in any court and should require similar abstention on the part of court personnel subject to the judge’s direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Id. at 545 (citing New Jersey Code of Judicial Conduct Canon 3A(8)).

New Jersey Code of Judicial Conduct Canon 2 stated that a judge “should avoid impropriety and the appearance of impropriety in all activities” and forbids a judge from “lending the prestige of office to advance the private interests of others...” *Broadbelt*, 683 A.2d at 548 (citing New Jersey Code of Judicial Conduct Canon 2).

178. *Broadbelt*, 683 A.2d at 551 (citing *Pickering v. Board of Education*, 391 U.S. 563, 567-70, 588 (1968)).

179. *Broadbelt*, 683 A.2d at 551.

180. *Id.*

181. *Id.* at 552 (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075-76 (1991) and *In re Hinds*, 449 A.2d 483 (N.J. 1982)).

182. *Broadbelt*, 683 A.2d at 552.

of a pending proceeding in *In re Seraphim*.¹⁸³ The court stated that the ethics provision might be overbroad for some persons, but that because of the nature of judicial duties the ethics provision was not unconstitutional as applied to judges.¹⁸⁴ While acknowledging that the judicial ethics provision prohibited all judicial comments on pending proceedings, whether or not the comments could have an effect on the outcome of the proceedings, the court felt that the provision was designed to "insure and inspire the impartiality of judges as well as juries."¹⁸⁵ All of the comments at issue were made during the course of judicial proceedings and demonstrated the judge's partiality.¹⁸⁶ Finding that the judicial ethics provision did not violate the First Amendment of the United States Constitution on the grounds of vagueness or overbreadth, the court suspended the judge without pay for three years, for these, and other, violations.¹⁸⁷

D. Endorsement for Political Office

In one significant case, the Supreme Court of Kentucky considered the constitutionality of restricting retired judges from endorsing nonpartisan judicial candidates. In *McDonald v. Ethics Committee of the Kentucky Judiciary*, the Kentucky Supreme Court held that it was unconstitutional to ban retired judges who were not then sitting as judges, but were available to sit, from endorsing nonpartisan judicial political candidates.¹⁸⁸ The Kentucky Ju-

183. 294 N.W.2d 485 (Wis. 1980), *cert. denied*, 449 U.S. 994 (1980). The Wisconsin Code of Judicial Ethics Rule 15 provided: "A judge shall not, while a judicial proceeding is pending, make any comment upon its merits, or make any comment which might affect its outcome or preclude a fair trial." *Id.* at 489 (citing Wisconsin Code of Judicial Ethics Rule 15).

184. *Seraphim*, 294 N.W.2d at 494.

185. *Id.* at 499.

186. *Id.* at 496.

187. *Id.*

188. *McDonald v. Ethics Committee of the Kentucky Judiciary*, 3 S.W.3d 740 (Ky. 1999). The court stated the question as "[w]e must determine whether Supreme Court Rule 4.300. Canon 5A(1)(b) of the Kentucky Code of Judicial Conduct prohibits retired judges who subjectively intend to accept future appointments as special judges from endorsing nonpartisan judicial political candidates." *Id.* at 741 (citing Kentucky Code of Judicial Conduct Canon 5A(1)(b)). However, Canon 5A(1)(b) applied to any candidate for public office, not just to judicial candidates. Canon 5A(1)(b) reads: "[a] judge or a candidate for election to a judicial office shall not make speeches for or against a political organization or candidate or publicly endorse or oppose a candidate for public office." *McDonald*, 3 S.W.3d at 742 (citing Kentucky Code of Judicial Conduct Canon 5A(1)(b)). The court's opinion makes it clear that the Code of Judicial Conduct applied to retired judges only when they were acting as judges. *McDonald*, 3 S.W.3d at 745. Therefore, the court's opinion would permit retired judges to endorse a candidate for any public office, not just a candidate for judicial office. *Id.*

dicial Ethics Committee (in Opinion JE-95) had held that retired judges who, if requested, subjectively intended to sit as judges but who were not then sitting as judges, were prohibited from endorsing judicial candidates.¹⁸⁹

The court disagreed, holding that the Code of Judicial Conduct did not apply to these retired judges.¹⁹⁰ Nevertheless, the court addressed the First Amendment issue and found that the restriction was not sufficiently tailored to serve the state's interest in the "preservation of the integrity, independence and objectivity of the judicial system" because the retired judge was not performing the duties of a judge.¹⁹¹

In *In re Code of Judicial Conduct*, the Florida Supreme Court addressed the constitutionality of several Judicial Conduct canons that had the effect of prohibiting sitting judges from endorsing political candidates in *In re Code of Judicial Conduct*.¹⁹² The court observed that the state had a greater interest in regulating the speech and conduct of its employees than it has in regulating the speech and conduct of its citizens.¹⁹³ The court also stated that there must be a balance between the public employee's interest in speaking on matters of public concern and the state's interest in efficiently providing public services.¹⁹⁴ In holding that the state's

189. *McDonald*, 3 S.W.3d at 742.

190. *Id.* at 745.

191. *Id.* at 744-745.

192. 603 S.2d 494 (Fla. 1992). Florida Code of Judicial Conduct Canon 1 stated:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further than objective.

Id. at 496 (citing Florida Code of Judicial Conduct Canon 1).

Canon 2 stated:

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his personal relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or authorize others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Code of Judicial Conduct, 603 S.2d at 496 n.4 (citing Florida Code of Judicial Conduct Canon 2).

Canon 7A (1) (b) provides that judges should not "publicly endorse a candidate for public office." *Code of Judicial Conduct*, 603 S.2d at 496 n.4 (citing Florida code of Judicial Conduct Canon 2).

193. *Code of Judicial Conduct*, 603 So.2d at 497.

194. *Id.*

compelling interest in upholding judicial impartiality, independence from political influence, and the public perception thereof outweighed the judge's interest in endorsing a candidate for election, the court determined that the canons did not violate the First Amendment.¹⁹⁵

E. Resign to Run

Another type of judicial ethics provision that has been involved in substantial litigation is the "resign to run" clause that requires judges wishing to run for non-judicial public office to first resign from judicial office.

In *Signorelli v. Evans*, the United States Court of Appeals for the Second Circuit rejected a constitutional challenge to a "resign to run" provision of the New York Code of Judicial Conduct.¹⁹⁶ A judge who desired to run for United States Congress argued that the canon violated the Qualifications Clause of the United States Constitution by adding a qualification, *i.e.*, that the Congressional representative not be a state judge.¹⁹⁷

New York Code of Judicial Conduct Canon 7A(3) "requires judges to resign from [their] position upon becoming a candidate for non-judicial office in a party primary or in a general election."¹⁹⁸ The Qualifications Clause provides: "[n]o person shall be a Representative who shall not have attained to the Age of twenty five Years and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."¹⁹⁹

In upholding the canon, the court noted that another provision of the United States Constitution, the Incompatibility Clause, provided: "No Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."²⁰⁰ The court held that the Incompatibility Clause did not preempt state regulation and that New York could enact "its own

195. *Id.* at 497-499.

196. *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980). A provision of the New York State Constitution also required judges who were nominees for non-judicial office to resign their office. *Id.* at 856 (citing N.Y. CONST. art. VI, §20(b)). Also at issue was a provision of a New York statute which banned judges from engaging in political activity except for reelection. *Signorelli*, 637 F.2d at 856 (citing N.Y. R. Judicial Conduct §33.7). The court upheld these provisions from constitutional attack. *Signorelli*, 637 F.2d at 863.

197. *Signorelli*, 637 F.2d at 855.

198. *Id.* at 856.

199. *Id.* at 858 (quoting U. S. CONST., art. I, § 2, cl. 2).

200. *Signorelli*, 637 F.2d at 859 (quoting U.S. CONST., art. I, § 6, cl. 2).

incompatibility principle, protecting the integrity and independence of the judicial branch from the conflicting activities of seeking and holding Congressional office."²⁰¹

In *Adams v. Supreme Court of Pennsylvania*, the United States District Court for the Middle District of Pennsylvania held that a "resign to run" ethics provision did not violate the Equal Protection clause or the First Amendment.²⁰² The ethics provision required district justices to resign if they ran for a non-judicial office.²⁰³

The plaintiff argued that the ethics provision violated equal protection because lawyers were permitted to seek a broader range of elective offices than non-lawyers.²⁰⁴ Pennsylvania law required candidates for higher judicial offices to be lawyers.²⁰⁵ Under the ethics provision, district justices could run for a higher judicial office without having to resign, however, only district justices who were lawyers could run for higher judicial office without resigning.²⁰⁶ The court held that because lawyers and non-lawyers who run for Congress are required to resign the office of district justice, and because plaintiff did not seek to run for higher judicial office, there was no equal protection violation.²⁰⁷

Additionally, the court rejected plaintiff's argument that the First Amendment required the state to show the ethics provision served a compelling state interest.²⁰⁸ In addressing the scrutiny required, the court noted that the ethics provision was helpful in preventing the abuse of judicial office and in safeguarding "the appearances of propriety."²⁰⁹ The court found "the less-restrictive alternative of a forced leave of absence would not be sufficient to guard the state's interests, because the danger of corruption, real or perceived, would persist with regard to defeated candidates on their return to the bench."²¹⁰

201. *Signorelli*, 637 F.2d at 861.

202. *Adams v. Supreme Court of Pennsylvania*, 502 F.Supp. 1282 (M.D. Pa. 1980). One of the authors of the instant article, Judge Abramson, was, at the time of that decision, one of the lawyers who represented the Supreme Court of Pennsylvania, and he argued in favor of the constitutionality of the ethics provision. *Id.* at 1283.

203. *Id.* at 1284.

204. *Id.* at 1291.

205. *Id.*

206. *Id.*

207. *Adams*, 502 F.Supp. at 1291.

208. *Id.* at 1292.

209. *Id.* at 1292.

210. *Id.*

In *Morial v. Judiciary Commission of Louisiana*, the United States Court of Appeals for the Fifth Circuit held that a judicial ethics provision requiring judges to resign to run for non-judicial office did not violate the First Amendment or the Equal Protection clause.²¹¹ The plaintiffs in *Morial* were a judge and thirteen voters who supported the judge's candidacy for mayor.²¹² The court noted that the judge's interest in running for non-judicial office without resigning was substantial, but not fundamental.²¹³ However, although the state had limited the judge's First Amendment right to run for office, the state permitted the judge to exercise other First Amendment rights.²¹⁴ For example, the judge was permitted to vote to express his private opinion on matters of public concern outside of a campaign and to hold beliefs without sanction.²¹⁵ The impact on voters was not substantial because restricting judges from being candidates unless they resign did not exclude candidates of a particular group or point of view.²¹⁶ The court held that the state was only required "to show a reasonable necessity for requiring judges to resign before becoming candidates for elective non-judicial office."²¹⁷ The court observed that the state's interest was in "the actual and perceived integrity of state judges."²¹⁸ The state sought to prevent abuse of the judicial office during a campaign, and, for unsuccessful candidates, after the campaign.²¹⁹ The state also had an interest in avoiding the appearance of impropriety during and after a campaign.²²⁰ The court held that the canon was reasonably necessary to support the state's interests.²²¹

211. *Morial v. Judiciary Commission of State of La.*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1979). The Louisiana Code of Judicial Ethics Canon 7(A)(3) provided:

A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

Id. at 297 (citing Louisiana Code of Judicial Ethics Canon 7(A)(3)).

212. *Morial*, 565 F.2d at 297.

213. *Id.* at 301.

214. *Id.*

215. *Id.*

216. *Id.* at 301-02.

217. *Morial*, 565 F.2d at 302.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 303.

The same rational basis test was applied to analysis of the equal protection claim.²²² The court noted that the canon created two classifications: judges who run for judicial office and judges who run for non-judicial office.²²³ Noting that judicial office was different from other offices, the court concluded that the canon was reasonably necessary to support the state's interests.²²⁴

V. CONCLUSION

Judicial ethics advisory committees should discard the notion that they should not consider constitutional rights in issuing their opinions. Judges and judicial candidates retain their constitutional rights. Judicial ethics regulations are not sacrosanct; rather they are limited by the United States Constitution. Considering the substantial number of constitutional decisions involving codes of judicial conduct, judicial ethics advisory committees should be mindful of the United States Constitution in rendering their advice and, at the very least, should adhere to binding constitutional precedents. However, to properly fulfill their duties, they should consider all constitutional precedents, such as those from other jurisdictions, not just those that are binding.

Likewise, the authors encourage judicial ethics advisory committees to be vigilant in scrupulously observing the distinction between mandatory and aspirational provisions of the Code of Judicial Conduct.²²⁵ Aspirational provisions of the Code of Judicial Conduct are by definition not compulsory. Thus, failure to observe these aspirational provisions cannot be the basis for discipline.²²⁶

222. *Morial*, 565 F.2d at 304.

223. *Id.*

224. *Id.* at 305-307. An example of the difference which appears during campaigns is that unlike in other campaigns for public office, in judicial campaigns, judges are prohibited from making promises. *Id.* at 305-06.

225. In an American Judicature Society educational judicial videotape, in response to panelist Professor Jeffrey Shaman's remarks that a judge in a mock scenario was acting unethically, panelist Jack Frankel, Esquire, stated that in his view, Professor Shaman's comments related to the question of good practice rather than good ethics. Videotape: Judicial Ethics and the Administration of Justice, (American Judicature Society, 1990) videotape 1, scenario 1, *State v. Ballard: A Pre-Trial Criminal Hearing*. Professor Jeffrey Shaman is a law professor at DePaul University College of Law and a Senior Fellow at the American Judicature Society. At the time of the video tape, Jack Frankel, Esquire, was Director and Chief Counsel to the California Commission on Judicial Performance. The authors are considering writing at a later time on the subject of the responsibility of judicial ethics advisory committees to observe the distinction between aspirational and mandatory provisions of the Code of Judicial Conduct.

226. This is not to say that observing what aspirational interpretations would suggest is not of valuable service.

When judicial ethics advisory committees render advice which mandates judges to observe the aspirational provisions of the Code of Judicial Conduct, many of the same negative effects follow as when judicial ethics advisory committees fail to consider the U.S. Constitution in rendering advice.²²⁷ If judicial ethics advisory committees consider it important to state a course of conduct that would be aspirational, they should make it clear that the conduct is aspirational and not compulsory. By observing judges' constitutional rights and the distinction between mandatory and aspirational provisions of judicial ethics regulations, judicial ethics advisory committees can avoid improperly restricting judges' conduct. In short, judicial ethics advice should not be unnecessarily restrictive of judges' actions.

Under the 1990 Code whatever is not prohibited by the Code as a whole is permitted. MILORD, *supra* note 17, at 33. In the 1990 Code, mandatory standards are denoted by the use of "shall" in the text and "must" in the Commentary. Aspirational standards are denoted by the use of "should" in the text and "may" in the Commentary. Preamble to the ABA MODEL CODE OF JUDICIAL ETHICS, ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY 271 (1990); MILORD, *supra* note 17 at 8. In the 1990 Model Code of Judicial Ethics "may" is used in the text to denote "permissible discretion" or to refer to "action that is not covered by specific proscriptions." ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY 271 (1990).

In contrast, in the 1972 Code, mandatory standards are denoted by "should." MILORD, *supra* note 17, at 8. Moreover, unless the 1972 Code indicates otherwise, the canons and text establish mandatory standards. Preface to the 1972 Code, *contra* Commonwealth v. Druce, 796 A.2d 321, 328 n.8 (Pa. Super. 2002).

Canon 1 of the 1972 Code and 1990 Code uses such general language that it has been observed that such language does "not establish a bright line for purposes of discipline." MILORD, *supra* note 16 at 12.

227. See *supra* notes 10-12 and accompanying text.